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In the

Supreme Court of the United States.

October Term, 1931.

No. 15

Interstate Commerce Commission,
Petitioner,

v.

The New York, New Haven & Hartford Railroad Company, Old Colony Railroad Company, Boston & Providence Railroad Corporation (Massachusetts), Boston & Providence Railroad Corporation (Rhode Island), Providence, Warren & Bristol Railroad Company, the Harlem River and Port Chester Railroad Company, Holyoke & Westfield Railroad Company, Providence & Worcester Railroad Company, Chatham Railroad Company, and Norwich & Worcester Railroad Company,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

JOHN L. HALL,
CHARLES O. PENGRA,
Counsel.

Choate, Hall & Stewart,
30 State Street,
Boston, Massachusetts.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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judgment of the Court of Appeals of the District of Columbia granting a writ of mandamus upon the application of the respondent railroad companies, ordering the petitioner, in making its final valuation of their properties under the so-called Valuation Act, to ascertain and include in the report the value of their interests in certain tracks and terminals. The respondents raise no question as to the jurisdiction of this Court, but respectfully submit that although the excluded property interests are of great pecuniary value there are no special or important reasons why this Court, in the exercise of its sound judicial discretion, should review the case.

Jurisdiction to review cases upon certiorari to the Circuit Courts of Appeals was not conferred for the purpose of affording the defeated party a further hearing, but for the two particular purposes of securing uniformity of decision in the several circuits and of bringing up cases involving questions of importance which it is in the interest of the public to have decided by this Court. *Magnum Import Company, Inc.*, v. *Coty*, 262 U.S. 159, 163. Presumably the same considerations determine the exercise of the jurisdiction to review cases from the Court of Appeals of the District of Columbia, for paragraph 5 (c) of Rule 38 indicates the following as the character of the reasons for granting such review:

> "Where the Court of Appeals of the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court."

That none of those reasons are found in this case will appear from the discussion herein of the points raised in the petition.

Statement of the Case.

The Proceedings before the Commission.

By Act of Congress on March 1, 1913 (c. 92, 37 Stat. L. 701, and c. 210, 42 Stat. L. 624) commonly known as the Valuation Act, which now appears as section 19a of the Interstate Commerce Act, the Interstate Commerce Commission (hereinafter referred to as the Commission) was directed to investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of the Act. Shortly thereafter the Commission entered upon an investigation, known as Valuation Docket No. 311, to ascertain the value as of June 30, 1915, of the property owned or used by the respondent railroad companies, all of which are controlled by or leased to The New York, New Haven & Hartford Railroad Company and together own an interstate railroad line through New York, Connecticut, Rhode Island, and Massachusetts operated as the New York, New Haven & Hartford system (hereinafter collectively referred to as the New Haven). On or about December 2, 1922, the Commission, having completed its investigation, published and served upon the New Haven a copy of its tentative valuation. The New Haven duly filed its protest against the failure of the Commission to ascertain and report the value of its rights in the tracks of the New York and Harlem Railroad Company (hereinafter referred to as the Harlem) from Woodlawn to Forty-third Street and in the passenger terminal known as the Grand Central Terminal and the approaches thereto, in New York City, and in the passenger terminal known as the South Station in Boston. Hearings on the protest were held before an examiner of the Commission at which testimony and documentary evidence was introduced by the New Haven in support of its protest. The issues were submitted to the Commission on May 18, 1926.

The following is a brief history of the New Haven's rights in the tracks and terminals in question, according to the

undisputed documentary evidence as set forth in narrative form in the respondents' bill of exceptions before the Court of Appeals (Record, p. 455 *ff.*).

The Tracks from Woodlawn to Forty-third Street.

The New York and Harlem Railroad Company was incorporated by the legislature of New York in 1831 and constructed its railroad from White Plains to New York City. The New York and New Haven Railroad Company, predecessor of The New York, New Haven & Hartford Railroad Company, was incorporated by the legislature of Connecticut in 1844, under a perpetual charter (Exhibit 2, Record, p. 495). After constructing its railroad from New Haven to the New York state line it applied to the New York legislature for authority to extend its railroad into New York City, but the authority was not granted (Record, pp. 457, 458). Thereafter, as a result of negotiations between the Harlem and the New Haven they entered into an agreement dated March 17, 1848, whereby, in the following language, the Harlem granted to the New Haven the right to run its trains over the Harlem's tracks into New York City (Record, p. 460, and Exhibit 7, Record, p. 520):

> "*Fourth.* It is mutually understood and agreed that when and as soon as the New York and New Haven Railroad Company shall have completed their road from the point of junction to Byram River, they shall have the right to run their trains, engines, and cars for the transportation of passengers, mails, expresses, freight, etc., over the track or tracks of the road of the New York and Harlem Railroad Company from the point of junction aforesaid to and into the city of New York, and as far over the same in the said City as the said Company's road shall extend, not however below the intersection of said Railroad and Pearl Street in

said City,—the said New York and New Haven Company furnishing their own haulage."

These rights were granted in perpetuity because the agreement was to continue in force "during the terms of their charters respectively and for all renewals thereof." Twelve days later the legislature of New York, by Act of March 29, 1848, amended the Harlem's charter in the following language (Record, p. 462, and Exhibit 8, Record, p. 529):

> "The New York and New Haven railroad company is hereby authorized to enter upon and run their cars and engines for passengers, freights, mails, expresses and other business, over the road of the New York and Harlem railroad company, from the point of junction of the roads of said companies at or near Williams' Bridge, in the county of Westchester, to the City of New York, and as far into the said city as the said Harlem railroad may extend, upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies; a copy of such agreement or agreements to be duly authenticated and filed in the office of the secretary of state of this state; and to take, transport, and convey persons and property upon the said Harlem Railroad, by the power and force of steam or animals or any mechanical power or combination of the same."

The above-mentioned agreement was duly authenticated and filed in the office of the Secretary of State, as provided in the Act (Record, p. 463). The New Haven has enjoyed and exercised the rights so granted from that day to this. On April 1, 1873, the Harlem leased its railroad to the New York Central and Hudson River Railroad Company (hereinafter referred to as the Central) for a term of four hundred and one years, but by paragraph Ninth the lease was made expressly subject to the rights of the New Haven

under the agreement (Record, p. 465, and Exhibit 11, Record, p. 559). The New Haven claimed that under the agreement it had a perpetual easement in the railroad of the Harlem from Woodlawn to Forty-third Street, and that, by virtue of the statute subjecting the Harlem's charter to the dominant rights of the New Haven upon the authentication and filing of the agreement in conformity therewith, the easement acquired the added advantages of a franchise.

The Grand Central Terminal.

The original terminal of the Harlem at Canal Street was moved north to Twenty-seventh Street in 1857, and further north to Forty-second Street in 1872. On November 1, 1872, the Harlem, the Central, and the New Haven entered into a tripartite lease whereby the Harlem was to construct the original Grand Central Depot at Forty-second Street and lease it to the Central and the New Haven for the joint use and occupancy of all three companies (Record, p. 464). Following the passage of an Act of May 7, 1903, requiring the substitution of electricity for steam as a method of operation in Park Avenue, the three railroad companies entered into a further agreement dated July 24, 1907, providing for the construction of the present Grand Central Terminal and its approaches as far north as Fifty-ninth Street (Record, p. 470, and Exhibit 13, Record, p. 593). Paragraph 3 provided:

> "The Central Company, acting for itself and the Harlem Company, as hereinafter authorized, in consideration of the rents hereinafter reserved to be paid by the New Haven Company, and in consideration of the covenants on the part of the New Haven Company hereinafter contained, hath demised, let and leased, and by these presents doth demise, let and lease unto the New Haven Company, during the term of the New Haven Company's charter and all renewals thereof, including

> the charter of any company which shall operate the present railroad of the said New Haven Company, the use, in common with the Central Company, subject to all the provisions of this agreement of the said Railroad Terminal for the accommodation of the traffic of the New Haven Company, other than freight traffic, provided, however, that the New Haven Company's right to the use thereof shall in no event exceed fifty (50) per centum of the maximum capacity of said Railroad Terminal, or any part thereof"—

and "as compensation for the premises hereby demised" the New Haven was to pay interest on the cost of construction and a proportion of the annual expenses for maintenance and operation. Paragraph 12 provided that the terminal should be under the sole charge and direction of a terminal manager appointed by the presidents of the Central and the New Haven and removable at any time upon written notice by either of them. Paragraph 25 provided that the covenants and agreements should remain in force during the term of the demise which by paragraph 3 was to continue "during the term of the New Haven Company's charter and all renewals thereof," and therefore in perpetuity. The New Haven claimed that this agreement gave it the perpetual possession and enjoyment of one undivided half of the terminal property, and that, as the agreement could be terminated only for non-payment of rent or upon the termination of its charter, neither of which events was within the control of the Harlem or the Central, it had an estate in base fee.

The South Station.

By Act of June 9, 1896, the legislature of Massachusetts incorporated The Boston Terminal Company with power to construct and maintain a union passenger station for the five railroad companies mentioned in the Act, including four

of the respondents herein, each of which was authorized to subscribe for 20% of its capital stock (Record, p. 477, and Exhibit 16, Record, p. 615). Section 9 provided:

> "All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land hereinabove authorized to be taken for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the Supreme Judicial Court, or any justice thereof, shall have jurisdiction in equity to enforce this provision."

The Act directed the railroad companies to pay to the terminal company the amounts necessary to pay the expenses of its corporate administration and of the maintenance and operation of the station, interest on its bonds, and a dividend of 4% on its capital stock, all in proportion to their respective use of the property. Section 25 provided that the terminal company should pay a franchise tax to Massachusetts upon its capital stock—

> "But its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

At the time of the valuation investigation the proportion of use as between the New Haven affiliates and the Central, as lessee of the Boston & Albany Railroad, was 75% by the former and 25% by the latter. The New Haven claimed that its statutory right and obligation to use the terminal property, together with the other provisions of the Act, gave it a perpetual easement therein.

The Final Valuation.

On or about January 14, 1930, the Commission made public and served on the New Haven its report and order dated November 13, 1929, purporting to fix the final valuation of its property. The portions of the report relating to the tracks and terminals in question appeared under the headings "Terminal Property at New York City" and "The Boston Terminal Company" (Record, pp. 60, 67). The report showed that, although the Commission found the rights of the New Haven in the tracks and terminals to be "valuable and essential to the operation of its property as a whole," "a valuable asset," it had refused to ascertain and report any value for those rights, on the ground that they were not entitled to be valued "for rate making purposes." As to the tracks from Woodlawn to Forty-third Street, the report stated (Record, p. 64):

> "In our finding of value of the property owned or used in common carrier service for rate-making purposes, we are of the opinion that no specific sum should be found for the carrier's right to use these tracks. It is therefore not necessary for us to determine whether the right of use in the carrier is best defined by reference to it as a license to use, an easement or a trackage right. We do recognize that the advantages to the carrier of these rights are valuable and essential to the operation of its property as a whole. Nevertheless, for the purpose of finding a rate base, it is distinguished only by its magnitude from the many other similar rights of carriers to the joint use of property wholly owned by other carriers."

As to the joint use of the Grand Central Terminal, it stated (Record, p. 66):

> "The right to use these extensive terminal facilities is a commercially valuable contract right owned by the

carrier, and this joint use thereof is also a valuable asset to the owning company. But for the purpose of ascertaining the value, for rate-making purposes, of the carrier's property owned or used in common carrier service, no specific value will be reported for the right of the carrier to the use of this property."

The Proceedings in Court.

On July 3, 1930, the New Haven filed in the Supreme Court of the District of Columbia its petition for a writ of mandamus directing the Commission, in the performance of its statutory duty, to ascertain and report the value of its rights in the tracks and terminals in question. The Commission answered that it had ascertained the value of the physical property, but not of the incorporeal rights of the New Haven therein, and had reported the entire value of the tracks from Woodlawn to Forty-third Street and of the Grand Central Terminal in the inventory of the Central, as exclusive operating lessee of the Harlem, and the entire value of the South Station in the inventory of The Boston Terminal Company. The pleadings and evidence showed that the action of the Commission in confining itself to the valuation of the physical property was in accordance with a rule which it had adopted for its own convenience and administration. The report on the valuation of the New Haven made express reference to Appendix 3 of its report on *Texas Midland Railroad,* 75 I.C.C. 1, for a statement of the methods of valuation employed (Record, p. 127). The applicable extracts from Appendix 3 were annexed to the petition, and laid down the broad rule that, where one carrier had a joint right to use property of another carrier, the physical property would be valued as a whole to the latter, or to its exclusive operating lessee, and that no part of the value of the property would be assigned to the right of the first carrier to use it.

The case was heard before Mr. Chief Justice Wheat of the Supreme Court of the District of Columbia, on February 12, 1931. On April 1, 1931, he handed down a "Memorandum Opinion," concluding that the Commission did not err in declining to value the New Haven's rights (Record, p. 434). His conclusion was based upon the practical difficulties inherent in undertaking to place a value on the many and varying rights of one carrier to use the property of another, and that the New Haven's rights were no different in kind from the ordinary trackage and terminal rights resulting from contract arrangements between carriers. On April 3, 1931, judgment was entered dismissing the petition and the New Haven noted an appeal.

The appeal was argued before the Court of Appeals of the District of Columbia, which, on January 18, 1932, handed down its unanimous opinion written by Associate Justice Van Orsdel, reversing the judgment of the Supreme Court of the District of Columbia and ordering a writ of mandamus in accordance with the petition (Record, p. 641). The Court decided that under the agreement of March 17, 1848, the New Haven had a perpetual easement in the railroad of the Harlem, and that the Act of March 29, 1848, amending the Harlem's charter, subjected its railroad to a dominant servitude in favor of the New Haven constituting a perpetual franchise; that under the agreement of July 24, 1907, the New Haven had a base fee in an undivided half of the Grand Central Terminal; and that under the Act of June 9, 1896, the New Haven acquired an ownership and perpetual right of use in the property of The Boston Terminal Company; that all of the foregoing rights were "property" owned and used by the New Haven and accordingly entitled to valuation under section 19a; that the Commission had no power to limit its valuation to a value "for rate-making purposes" or in so doing to exclude such rights from valuation; and that the failure of the Commission to ascertain and report the value of those rights was a breach of duty for which mandamus was the proper remedy.

STATUTES.

The Valuation Act of March 1, 1913 (c. 92, 37 Stat. L. 701), now appearing as section 19a of the Interstate Commerce Act, was amended in certain respects on June 7, 1922 (42 Stat. L. 624), and the following are the material provisions thereof as so amended:

"Sec. 19a. (a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"(b) First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the method by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for

any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

"Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

"Fifth. . . .

"(e) Except as herein otherwise provided, the Commission shall have power to prescribe the method of

brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Argument.

The contentions of the Commission will be discussed in the order in which they appear in Part V of its brief:

A.

ALTHOUGH IN CERTAIN ASPECTS THE CASE IS OF IMPORTANCE IN THE VALUATION OF RAILROAD PROPERTY, THE DECISION OF THE COURT OF APPEALS IS SO MANIFESTLY SOUND THAT THE QUESTION DOES NOT NEED TO BE SETTLED BY THIS COURT.

The Commission has declined to ascertain and report the value of part of the New Haven's property consisting of what the Court of Appeals held to be a "perpetual easement and franchise" in the tracks of the Harlem railroad from Woodlawn to Forty-third Street, a "base fee" in an undivided half of the Grand Central Terminal and approaches, and an "ownership and perpetual right of use" in the South Station, Boston. By subdivision (a) of section 19a Congress made it the duty of the Commission to "investigate, ascertain and report the value of all the property owned or used by every common carrier." The Commission has assigned various reasons for not ascertaining and reporting the value of this part of the New Haven's property, but, however far the practical and administrative considerations advanced by the Commission be pursued, we eventually return to the plain and elementary proposition that the Commission did not "ascertain and report the value of all the property owned or used" by this carrier. In so doing the Commission manifestly disregarded a direct and explicit duty imposed by Congress, and mandamus has been held by this Court to be the proper remedy in such a case.

1. The decision of the Court of Appeals will not necessarily require the revaluation of the property of other carriers.

Section 19a, commonly known as the Valuation Act, was enacted on March 1, 1913. The Commission proceeded with the valuation work and on July 31, 1918, published its first final valuation report, *Texas Midland Railroad,* 75 I.C.C. 1. The Commission, as stated in that report, did not know for what purpose the valuations were to be used:

> "The act does not specify any purpose for which a value is to be found or to which the valuation is to be put, except as it provides that all valuations by the Commission shall be *prima facie* evidence of the value of the property in all proceedings under the act to regulate commerce, in all judicial proceedings for the enforcement of that act, and in judicial proceedings brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Commission" (Report, p. 6).

Nevertheless it announced, in an elaborate appendix to the report, certain rules for the valuation of what it described under the general term "trackage rights." The rule may best be stated in the Commission's own language:

> "It often happens that a carrier which owns and uses its property gives to some other carrier a qualified use in that property in common with itself. Such use is generally denominated a trackage right, and is the right to use the tracks of the owner for a compensation usually varying with the extent of the use. . . . Where property is owned by a common carrier and is used by it jointly with another carrier or carriers for common carrier purposes, the property is included in detail in the inventory of the owning carrier and reference is made to the use by the other carrier or carriers" (Appendix, p. 122).

The Commission says in its brief that, as the Act did not contain any "specific direction for the treatment to be accorded 'trackage rights,'" this was announced as a "reasonable method" for valuing them.

The difficulties which the Commission has encountered in subsequent valuations have arisen from the fact that the definition of "trackage rights" was too comprehensive. Some trackage rights constitute an estate or interest in the physical property itself and some do not. The trackage and terminal rights vested in the New Haven by the various contracts, leases, and statutes in evidence undoubtedly constituted estates in the property itself. In the language of the Court of Appeals:

> "From the foregoing it is apparent that the New Haven company acquired most valuable property and franchise rights in the use and operation of the railroad and terminal which are entitled to consideration in the fixing of a valuation upon all its property and its property rights."

These estates were "property," and they were both "owned and used" by the New Haven, and accordingly entitled to valuation. The Commission in its report did not deny that they were property, but it declined to ascertain and report their value, although expressly finding that they were "valuable" on the ground that they nevertheless were "trackage rights" and accordingly not entitled to be valued "for rate making purposes." As the Court of Appeals said:

> "The Commission in its report discloses complete non-action on the matter of the valuation of this property. It expressly finds that such valuation is not necessary for the purpose of establishing a rate base."

The legal nature of the New Haven's rights is not a question of general importance. It is an ordinary question of

real-property law which affects only this particular valuation, and does not need to be settled by this Court. The Commission says that its method of valuing "trackage rights" has been applied in over 1000 valuations, but it does not follow that any substantial number of carriers had, or claimed to have, estates or interests in the property itself so as to require revaluation of their properties.

At the date of the *Texas Midland Railroad* report, July 31, 1918, the Commission found its rule workable, because, as already pointed out, it did not know what use Congress proposed to make of the valuations. Up to that time the Commission had been concerned primarily with the making of rates, so it assumed that the valuations would certainly be available for use in rate making, and accordingly adopted the practice of designating its single sum valuations as the "value for rate making purposes." By the Transportation Act of February 28, 1920 (c. 91, 41 Stat. L. 456, *ff.*), however, Congress amended the Interstate Commerce Act by expressly providing that the valuations made under section 19a, the old Valuation Act, should be *prima facie* evidence, not only in rate making, but also in consolidation, section 5, and recapture, subdivisions (4) and (6) of section 15a, and by reason of being *prima facie* evidence of value in all other proceedings under the Act, they became of importance in the division of joint rates, subdivision (6) of section 15, and the issuance of securities, subdivision (2) of section 20a. The Commission was thus fully advised, within two years after the *Texas Midland Railroad* report, of the precise purposes for which the valuations were to be used. Whether or not a rule which assigns the entire value of a terminal to one carrier, although another carrier has a recognized property interest therein, is workable in establishing rates which as between the carriers as a whole or by groups and the public will yield a fair return on the aggregate property used in the service, it is fundamentally unworkable in consolidation, for example, where the rights of

each carrier as an owner of private property are involved. A valuation which omits part of the property of a carrier is necessarily inadequate for such a purpose, yet the Commission has deliberately continued to designate all its valuations as "value for rate making purposes" and, in so doing, to exclude from valuation everything falling within its own arbitrary definition of "trackage rights," announced at a time when it was dealing solely with rate making. Admittedly the question whether the Commission is authorized to report a "value for rate making purposes" involves the construction of a federal statute on a point of great importance in railroad valuations, but now that the Act makes that same valuation *prima facie* evidence in consolidation and other proceedings involving private ownership as between one carrier and another, it requires no decision by this Court to adjudicate the plain duty of the Commission to ascertain and report the value of a perpetual easement and a base fee in the heart of New York City, what the Commission itself has recognized as "valuable and essential to the operation of its property as a whole," a "valuable asset."

2. The valuation to the New Haven of its rights in the property will not result in duplication of values for rate making or other purposes.

The Commission contends that to value the contracts separately from the physical property would result in duplication and make the aggregate valuation greater than the value of the property. In this the Commission fails to distinguish between those contracts which create mere contractual rights and those which create estates in the property itself. The New Haven is not placing any academic interpretation on the word "property." It is not using it in the constitutional sense, which includes contracts, labor, and other individual rights. It is not asking the Commission to value as such the agreements of March 17, 1848, and

July 24, 1907. It is using "property" in the same sense as the Commission, namely, the tracks and the terminals; but those agreements created a property interest, an estate, an incorporeal hereditament, in the tracks and terminals themselves. The Harlem is not the sole owner of that property and neither the Harlem nor its lessee, the Central, is entitled to have the full value of that property included in its inventory. The ownership of the property is subject to the estates therein. The value of those estates should be deducted from the value of the tracks and terminals and assigned to the carrier. There would then be no duplication.

The Commission's difficulties in this respect again flow from its persistent adherence to its own arbitrary rule that "trackage rights," whether or not constituting an estate in property, are not entitled to valuation. When the rule was laid down the Commission understood that what Congress wanted was an inventory of all the railroad property in the country. To quote from its own report on the *Texas Midland Railroad:*

> "When the valuation work has been completed for all the railroads in the United States, the Commission, the Congress, and the public will be informed with respect to every piece of property used in serving the public with the single exception of that insignificant portion which is privately owned and partially used by common carriers. . . . All the property used in serving the public will be inventoried and valued, and will be inventoried and valued once and only once."

The announced purpose was an inventory of the physical property, and accordingly the Commission inventoried each piece of physical property to some one carrier without attempting to assign that value to and among the several carriers who might have estates therein. In making its arbitrary selection of the carrier in whose inventory the piece of property should be valued the Commission adopted its rule

as to "trackage rights." But that rule, though roughly workable for making an inventory, became obviously obsolete after the several purposes to which the valuations were to be put were defined by Congress in the amendment of February 28, 1920. Naturally, if the Commission includes the entire value of a terminal in the inventory of one carrier and then values to other carriers their easements and other estates therein, the aggregate value in the rate base will be more than the total value of the terminal, but the duplication results from assigning to the first carrier the entire value of the terminal. To find the value of a piece of property subject to an easement, the value of the easement, if, as here, it has value, must first be deducted. This question of duplication presents for consideration only the most elementary principle of valuation, a principle which does not need to be settled by this Court.

The same may be said of the Commission's argument that the value of the New Haven's rights in the property should not be included in the rate base because the rentals paid for those rights are deductible in computing "net railway operating income" for the purpose of establishing rates which will yield a fair return. Subdivision (1) of section 15a provides that in computing "net railway operating income" there shall be included "debits and credits arising from equipment rents and joint facility rents." The New Haven has reported these rentals as "joint facility rents" because its accounts must conform to the uniform system prescribed by the Commission, but even if they are "joint facility rents," the Commission's point affects only the quantum of value to be placed on the New Haven's rights and in no way justifies a refusal to ascertain and report what that value is. If the rentals are deductible in determining net railway operating income, it may well be that the obligation to pay them should be capitalized and deducted in ascertaining the value of the New Haven's rights. This would be in accordance with the ordinary commercial method of valu-

ing a leasehold at the excess of the rental value of the property over the rent reserved in the lease. The right to run trains over the twelve-mile stretch from Woodlawn to Forty-third Street, affording an entrance into New York City, and the right to use the Grand Central Terminal and the South Station at the termini of what is one of the most important and intensively used passenger routes in the country, are of immense value, far in excess of the rentals which in the case of the terminals are simply a proportion of interest and the cost of maintenance. Instead of approaching this problem of valuation in the usual way the Commission has arbitrarily declined to undertake the task.

3. The decision of the Court of Appeals is not in conflict with its prior decision in Kansas City Southern Railway Company v. Interstate Commerce Commission, 6 Fed. (2d) 692, or with the decision of the Circuit Court of Appeals for the First Circuit, Boston Terminal Company v. Gill, 246 Fed. 664.

(*a*) One point presented to the Court of Appeals in *Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 6 Fed. (2d) 692, related to the alleged failure of the Commission to ascertain and report the value of the rights of certain railroads to use certain terminal railway properties under operating arrangements similar to those in the South Station, Boston, but the point there presented to the Court of Appeals was entirely different from the point presented here. The difference lay in the disposition which the Commission had made of the question. In both cases the petitioner sought a writ of mandamus to compel the Commission to ascertain and report the value of its rights in the terminal properties, but in that case the report of the Commission which was incorporated into the record showed that the Commission had acted on the subject by determining that the carrier did not own or

use those properties within the meaning of section 19a. For example, in respect of the elevator, the Commission said in its report, 75 I.C.C. 223, 235:

> "The property is neither owned nor used by the carrier and for this reason has no place in the carrier's valuation."

Accordingly the Court of Appeals rightly decided that, as the Commission had determined the legal status of the carrier's rights adversely to the carrier's contention, the report disclosed only an error of law, as distinguished from a breach of duty. Contrast the language in the report in that case with the following language in the report on the New Haven (Record, p. 67):

> "But for the purpose of ascertaining the value for rate making purposes of the carrier's property owned or used in common carrier service, no specific value will be reported for the right of the carrier to the use of this property."

In short, as the Court of Appeals said, the report "discloses complete non-action on the matter of the valuation of this property." The distinction between the two cases is the very distinction pointed out by this Court in *United States* v. *Los Angeles & Salt Lake Railroad Co.*, 273 U.S. 299, holding that errors of law made by the Commission cannot be corrected by a bill in equity under the Urgent Deficiencies Act or otherwise until the Commission attempts to make use of the final valuation in some proceeding, but that, as Congress has prescribed in detail the subjects on which findings should be made—

> "Every party in interest is therefore entitled to have and to use this evidence; and the carrier, being a party in interest, has the remedy by mandamus to compel the Commission to make a finding on each of the subjects

specifically prescribed. *Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 252 U. S. 178."

(*b*) The case of *Boston Terminal Company* v. *Gill,* 246 Fed. 664, involved the status of The Boston Terminal Company, which constructed the South Station, its capital stock being owned by the operating railroad companies and they being required by statute to use and pay for the maintenance of the property. The only question before the Court was whether the terminal company was "organized for profit" and "engaged in business" within the meaning of the Federal Excise Tax on Corporations. The Court held that the corporation was subject to the tax, but nothing in the decision affected the question as to whether the right and statutory obligation of the railroad companies to use the terminal created estates in the property itself. In fact, the opinion of the District Judge, which was approved by the Circuit Court of Appeals, pointed out that, although the statute required the terminal company to pay a franchise tax on its capital stock, the same statute provided that the real estate should be assessed for taxation directly to the operating railroad companies which should be deemed to be the owners thereof. That decision, if anything, supports the decision of the Court of Appeals now under consideration, in holding that—

> "The property rights of the New Haven to be valued by the Commission are not measured by the capital stock it holds in the terminal company but by the ownership and perpetual right of use it has acquired in the terminal tracks and station."

B.

THE CASE DOES NOT INVOLVE AN ERROR OF LAW IN THE CONSTRUCTION OF THE STATUTE, BUT A BREACH OF AN EXPLICIT DUTY IMPOSED ON THE COMMISSION BY THE STATUTE.

1. The decision of this Court in Kansas City Southern Railway Co. v. Interstate Commerce Commission, 252 U.S. 178, was rightly held by the Court of Appeals to be decisive of this case on the question of the remedy.

The Commission contends that in ascertaining and reporting the value of the New Haven's property it necessarily had to interpret the phrase "property owned or used," and that the exercise of its judgment and discretion in this respect could result only in an error of law as distinguished from a breach of duty. It endeavors to distinguish the decision of this Court in *Kansas City Southern Railway Co.* v. *Interstate Commerce Commission,* 252 U.S. 178. In that case, after the Commission had completed its tentative valuation, the carrier filed a protest on the ground that the Commission had failed to include "the present cost of condemnation and damages or of purchase in excess of such original cost and present value," in spite of the mandate in subdivision (*b*), second, of section 19a, directing the Commission to determine those items. The Commission assigned, as the reason for its failure to report the value of those items, the practical impossibility of ascertaining it. This Court, reversing the decisions of the Supreme Court and Court of Appeals of the District of Columbia, ordered a writ of mandamus directing the Commission to perform its statutory duty in this respect. The Court said, at page 187:

> "It is obvious from the statement we have made, as well as from the character of the remedy involved, that we are required to decide not a controversy growing out of duty performed under the statute but one solely involving an alleged refusal to discharge duties which

the statute exacts. Admonishing as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution to the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.

. . . . . .

"Finally, even if it were further conceded that the subject matter of the valuation in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

That case is identical in principle with this case. There the Commission sought to justify its failure to report the condemnation value of the carrier's property on the ground that it was a practical impossibility to ascertain it. Here, likewise, the Commission seeks to justify its failure to report the value of an important part of the carrier's property because of the inherent practical difficulties in ascertaining the value of "trackage rights." The Commission points to the absence of any express mention of "trackage rights" in the statute as leaving the determination of their treatment to the discretion of the Commission, but subdivision (a) of section 19a plainly directs the Commission to ascertain and report the value of "all the property owned or used" by every carrier and, in addition, subdivision (b), second, re-

way Co., 163 U.S. 564, but the Court of Appeals rightly held that that decision is not applicable to this case. It is in the language of the opinion in that case that the Commission purports to find its authority for classifying rights of the type involved in this case as "trackage rights." The Union Pacific Railway Company granted to four other railroad companies the right to use certain tracks of the former. The contracts were similar in form, so the Court dealt with the contract with the Chicago, Rock Island and Pacific Railway Company. The Pacific Company "lets the Rock Island Company into the full, equal and joint possession and use of its main and passing tracks" between certain points for 999 years. "Schedules of rules and regulations" for the movements of trains were to be made by officers of the lessor and lessee, subject to the decision of referees in case of disagreement, but "all trains" were to be "moved under the immediate direction of the superintendent or other officer of the lessor company." The Pacific Company might admit any other company to the joint use and possession of the same tracks provided such additional burden did not interfere with the Rock Island Company. Following a change in management of the Pacific Company it repudiated the contract and undertook forcibly to prevent the Rock Island Company from using the tracks. Thereupon the Rock Island Company brought a bill in equity for specific performance of the contract and the Pacific Company answered that the contract was *ultra vires* because as a federal corporation it had no power to disable itself by contract from the full performance of its public duties. The Court did refer to the contracts as an arrangement for "trackage rights," but the question of the legal status of the rights of the Rock Island Company was purely incidental to the real question of whether the contracts involved such a surrender of its franchise by a federal corporation as to be *ultra vires*. The substance of the decision was that the Pacific Company had not so surrendered the possession and control of its tracks

to the Rock Island Company as to disable it from performing its public franchise duties.

As to the incidental interpretation of the contract, the decision turned on the point that when the trains of the Rock Island Company came onto the tracks they were "moved under the direction of an officer of the Pacific Company," a point which sharply distinguishes that case from this, for when the trains of the New Haven come onto the tracks from Woodlawn to Forty-third Street they are not moved under the direction of an officer of the Harlem or of the Central, and, as the Court of Appeals pointed out, the rights of the New Haven are not subordinate to, but coextensive with, those of the Harlem, for the New Haven may absorb the use of the entire tracks with certain exceptions as to express trains.

This Court is not concerned primarily with questions of real-property law. The significance of that decision as a judicial determination by this Court lay, not in its interpretation of the property rights created in the Rock Island Company by the contract, but in its construction of the corporate powers of the Pacific Company under its federal charter. The Court was not undertaking to define "trackage rights," either generally or with precision, and used the expression, not as legally descriptive of any particular form of contract, but as practically descriptive of the type of business arrangement under consideration. The expression "trackage rights" is obviously not a legal definition, but merely descriptive phraseology to which the Commission has undertaken to give legal significance. Even if the Court had established "trackage rights" as a legal definition, the decision involved only a question of real-property law, not a question of general importance, nor involving the construction or application of a federal statute. It is not a question which, standing by itself, would merit review by this Court on certiorari.

Conclusion.

In conclusion the attention of the Court is invited to the precise nature of this proceeding. A casual reading of the Commission's answer to the mandamus petition might suggest that the Court of Appeals has undertaken to decide in favor of the New Haven a question which the Commission had decided adversely. That is not the situation. The Commission does allege in its answer that the New Haven has no property interest in the tracks and terminals, only a license to use them. But it is in the answer that that contention first appears. The question was presented to the Commission for decision in the valuation proceedings, but the Commission did not decide the question, stating in its report that it was unnecessary to do so. In that respect the report is incomplete and the Commission cannot complete its incomplete report by its answer in court. It is the report of the Commission, not the decision of the Court, which is made *prima facie* evidence in rate making, consolidation, recapture, division of joint rates, and the issuance of securities. That is why the Commission's claim that the New Haven is using mandamus as an indirect means of reviewing the valuation is without foundation. It is an absence of decision, not an error in decision, of which the New Haven complains.

In *Kansas City Southern Railway Co.* v. *Interstate Commerce Commission*, 6 Fed. (2d) 692, discussed above under Part B (1), the Kansas City Southern Railway Company sought similar relief by mandamus because of the failure of the Commission to ascertain and report the value of its rights in certain terminal properties, but there the Commission in its report had decided the nature of the carrier's rights adversely to the carrier's contention, whether erroneously or not, and accordingly the Court of Appeals declined to grant the writ. Measured solely by the pecuniary value of the rights involved, the great Kansas City terminal

properties, that case was comparable in importance to this case, yet this Court denied certiorari in 269 U.S. 570. In that case the Court of Appeals declined to grant the writ because the Commission had already decided the question; in this case they granted the writ because the Commission had not decided the question. It is respectfully suggested that the reasons for a review by certiorari advanced by the Commission in this case present no more cogent appeal to the sound judicial discretion of this Court than did the reasons advanced by the carrier in that case.

Respectfully submitted,

JOHN L. HALL,
CHARLES O. PENGRA,
of CHOATE, HALL & STEWART,
30 State Street,
Boston, Massachusetts.